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Supreme Court, U.S.
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Docket No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LINDA MORRISON BOCZAR
and **JAMES J. BOCZAR**

Petitioners

versus

DAVID KINGEN, et. al.,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

Opinion of the United States District Court for the Southern District of Indiana, Indianapolis Division

("Entry After Trial, Containing Findings of Fact and Conclusions of Law")

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Petitioners
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630PP

UNITED STATES DISTRICT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LINDA MORRISON BOCZAR and JAMES J. BOCZAR, Plaintiffs,	)	
vs.	)	IP 99-0141-C-T/G
DAVID KINGEN, HELGA BEHROOZI, LARRY DORFMAN, DAVID HALVORSON, REBECCA MARCUS, JANE NOLAN, ROBERT PINKLEY, and John/Jane Doe, Individually and in their official capacities as members of the Meridian Street Preservation Commission, and MERIDIAN STREET PRESERVATION COMMISSION, And GENE LAUSCH and RHONDA J. FIELDS, individually and in their official capacities as Director and Manager of Permit Issuance of the Department of Metropolitan Development, City of Indianapolis respectively, and CITY OF INDIANAPOLIS, Defendants.	)	

Entry After Trial, Containing Findings of Fact and Conclusions of Law

The general background of this dispute has been described in the previous entries addressing the motion to dismiss of the Meridian Street Preservation Commission (the "MSPC") and its members (collectively the "State Defendants") and the Plaintiffs' motion for preliminary injunction, so little more needs to be

described about how this fight got started. Trial was held and the court received testimony in person as well as some deposition testimony and documentary exhibits. These findings are based on a preponderance of the evidence.[1] Plaintiffs, Linda Morrison Boczar and James J. Boczar represent themselves in this cause of action. Mr. Boczar is trained as a lawyer but is not currently in active practice as a litigator. Ms. Boczar is a medical doctor[2] and claims the no training in legal matters. The Plaintiffs brought five claims (with some sub-parts) to trial, based on their Amended Complaint.[3] They described their claims in the closing argument as follows:

Count I: The statute creating the Meridian Street Preservation Commission is unconstitutional, both on its face and as applied to their property;

Count III: the actions of the City of Indianapolis, through Defendants Lausch and Fields, in issuing a "stop-work" order and revoking the Plaintiffs' building permit were done without justification or authority;

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1 Should any of the findings of fact be more appropriately deemed conclusions of law, or vice versa, then they should be so deemed regardless of how such findings or conclusions are labeled.

2 During pretrial proceedings, Ms. Boczar disclosed that she is a practicing physician and indicated that she prefers to be addressed by the honorific "Doctor". Even though neither the pleadings filed by the Plaintiffs nor her signature identified her in that way, the court honored that request and will continue to do so throughout this entry.

3 Prior to trial the court dismissed all claims against Defendants the MSPC and its members in their official capacities. The federal damages claims against the MSPC members individually were also dismissed. During trial, on the Plaintiffs' motion, Counts II and VIII were dismissed with prejudice.

Count V: The actions of the Defendants, purportedly done under authority of the Meridian Street Preservation Act ("MSPA" of "Act"), were arbitrary and capricious, and violated the Plaintiffs' due process rights under the Fourteenth Amendment to the United States Constitution;

Count VI: The actions of the Defendants, purportedly done under authority of the Meridian Street Preservation Act ("MSPA"), were arbitrary and capricious, and violated the Plaintiffs' due process rights under Article 1, Section 12 of the Constitution of the State of Indiana; and,

Count VII: The actions of the Defendants constitute a taking out the Plaintiffs' property without just compensation, both with respect to the revocation of the building permit and the affect it has had on the temporary use of their fee interest in the property.

At times the presentation of the evidence wandered a bit, displaying the flavor and depth of a bitter neighborhood feud and revealing some of the expectable frustrations of dealing with governmental regulatory boards and agencies. The findings and conclusions herein, though, will be limited to matters relevant to the establishment of or the defeat of these claims.

The Defendants City of Indianapolis, Gene Lausch, Rhonda Fields and David Kingen and David Halvorson in their individual capacities (collectively the "City Defendants") move for judgment in their favor. As for Count I, they contend that Defendants Kingen or Halvorson cannot be held liable in their individual capacities for an official decision of the MSPC and they are entitled to quasi-judicial immunity for their

actions. As for Count III, they argue that the evidence fails to support Plaintiffs' claim and does not establish Plaintiffs had any protectable property interest. They also contend that the City cannot be held liable under *Monell v. New York City Department of Social Services*, 436 U. S. 658, 694 (1978), and that the individual defendants are entitled to qualified immunity. The City Defendants contend that they are entitled to a judgment on Count V for the same reasons and, additionally, the evidence fails to prove that Defendants Kingen and Halvorson perform any act in their individual capacities which deprived the Plaintiffs on any constitutional rights. They also assert the defense of quasi-judicial immunity. With respect to Count VI, the City Defendants contend there is no action for damages directly under the Indiana Constitution and that the evidence fails to establish a violation of that Constitution. They contend the Plaintiffs' claims in Count VII are barred for failure to pursue an inverse condemnation action under state law. In addition, the City Defendants claim that because the Plaintiffs had no property right in their permits, they are not entitled to any compensation for the "taking" of the same. Finally, it is argued that the doctrine of unclean hands bars all of the Plaintiffs' claims for equitable relief.

The State Defendants moved for involuntary dismissal of this action. In support of their motion, they contend that the Plaintiffs are precluded from relitigating whether the changes in the plans are acceptable by their failure to timely seek judicial review of the MSPC's Order of May 25, 1999. They also argue the Commissioners are entitled to quasi-judicial immunity under the state law claims. It is claimed that the evidence fails to establish that any Commissioners caused the City to issue the stop-work order or

is approximately 150 feet wide and 420 feet deep and is heavily wooded in comparison to other lots in the vicinity of Meridian Street.

When the property was purchased, the Boczars were aware that the home was located within the historic district. The Boczars' plans at the time of purchase included making at least minimal renovations, and possibly a major renovation in order make it suitable for a family of six. Their realtor had warned them that it was difficult to get approval for renovations in the Meridian Street historic district. However, Dr. Boczar had been successful in the past in getting approval from an historic preservation board in Florida for the designation of a house has historic.

The MSPA's purpose is expressly stated in the statute as follows:

(a) The purpose of this chapter is to preserve:
(1) From deterioration;
(2) From improperly conceived or implemented change; and
(3) For the continued health, safety, enjoyment, and general welfare of the citizens of Indiana;
a historic, scenic, esthetically pleasing, and unique part of a street lying with any Indianapolis constituting the backbone are unique residential area.
(b) The general assembly intends, by passage of this chapter, to:
(1) Encourage private efforts to maintain and preserve that part of the street and other similar streets and areas in Indiana;
(2) Promoted orderly and proper land usage;
(3) Preserve significant tourist attractions of historical and economic value in Indiana;
by limiting and restricting unhealthy, unsafe, unaesthetic, and other use of unique areas that would be inconsistent with their character as tourist attractions and what the general welfare of the public. Ind. Code § 36-7-11.2-1.

revoke the Plaintiffs' building permits and that any action by Commissioner to petition the City to take action against the permits or issue the stop-work order is entitled to First Amendment protections. The State Defendants contend that the Plaintiffs had no protectable property interest in their permits and that Indiana's statutory scheme affords them ample due process.

I. Findings of Fact

The Plaintiffs, Dr. Linda Morrison Boczar and James J. Boczar, own a house at 4821 North Meridian Street, Indianapolis Indiana.[4] This location is within the area subject to the MSPA. *See* Ind. Code §§ 36-7-11.2-1 through 36-7-11.2-67. They had purchased a house in July 1966. The house was a single story ranch style dwelling, and was categorized in the MSPC "design guidelines" as a non-contributing type of architecture. It is one of the seventeen ranch-style residences in the area within the jurisdiction of the MSPC. The dwelling was built in 1949/1950 and had not undergone any major renovation prior to the Plaintiffs' purchase. The lot on which the dwelling sits

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[4] Plaintiff Dr. Linda Morrison Boczar was the sole titleholder of the property and sole plaintiff in this action until just days before the preliminary injunction hearing. On May 24, 1999, Dr. Boczar issued a deed for the property to her husband and herself. Mr. Boczar was then permitted to join the litigation has a plaintiff. Mr. Boczar testified at the preliminary injunction hearing the Dr. Boczar did not.

According to Dr. Boczar, the purchase price of the house ($189,500 with a rebate for the poor condition of the roof, reducing the price to $184,500 -- although a closing document indicated the purchase price was $194,500) was paid from the proceeds of the sale of Florida home that the Boczars owned jointly. According to Mr. Boczar, the title was originally held in that manner for convenience as he was in Florida and Dr. Boczar was here. Dr. Boczar testified that Mr. Boczar was added to title so she would not have to be the only one going to meetings and court regarding the property and so Mr. Boczar could "officially participate in the proceedings." (Tr. of 9/7/99 at 83.).

As a result of the MSPA, the MSPC is constituted. Ind. Code § 36-7-11.2-18. The members of the MSPC are appointed as follows: (1) the executive of Indianapolis appoints: (a) an architect registered under Indiana Code § 25-4-1 who at the time of appointment is a practicing architect residing in Marion County, and (b) an employee of the department of metropolitan development who is employed by the department at the time as a professional city planner; Ind. Code § 36-7-11.2-20; and (2) the governor appoints: (a) an individual with a demonstrated interest in and knowledge of historic preservation, (b) an owner and occupant of a single or double family residential dwelling situated on Meridian Street property, and (c) a member of each of the following neighborhood associations: (i) Butler-Tarkington Neighborhood Association, (ii) the Meridian-Kessler Neighborhood Association, (iii) the Meridian Street Foundation, and (iv) the Riverview-Kessler Neighborhood Association; and (d) a member of the Indiana historical society. Ind. Code §§ 36-7-11.2-21, 36-7-11.2-22.

Construction, alteration and modification of structures within the area subject to the MSPA is regulated by the MSPC. Ind. Code § 36-7-11.2-27; *See also* Ind. Code § 36-7-11.2-61. Before virtually any significant construction, alteration or demolition of a structure subject to the MSPA can be performed, a "Certificate of Appropriateness" must be obtained from the MSPC. Ind. Code § 36-7-11.2-61. The MSPC publishes a document entitled "North Meridian Street Area Design Guidelines." This publication has never been formally adopted by the MSPC as an official guideline or requirement of construction in the area. However, they are referred to by some of the Commissioners from time to time in considering requests for certificates of appropriateness.

Four types of design styles are predominant in the Meridian Street area: Italianate, Tutor, French Eclectic and Ranch. There is also a mixture of various other styles.

Construction, alteration and demolition of structures in the area of the Plaintiffs' house is also regulated by the City through its Department of Metropolitan Development ("DMD").[5] In order to perform significant construction or alteration of the Plaintiffs' house, they not only would have to obtained a Certificate of Appropriateness from the MSPC, but also certain permits from DMD such as a Building Permit and an Improvement Location Permit. (Rev. Code § 536-201(a) (1998) (requiring, with certain exemptions not applicable here, the issuance of a building permit by the neighborhood and development services division before construction may began in the City of Indianapolis); § 536-205(b)(3) (requiring application for building permit to be supported by an improvement location permit when such a permit is required); *see also* Ind. Code § 36-7-11.2-61(c) ("The [DMD] made not issue a permit for construction, reconstruction, alteration, or demolition of a structure in the area unless the application for the permit is accompanied by a certificate of appropriateness."). The records of the MSPC are kept by the DMD at the offices of the DMD at the City-County building in Indianapolis. The records of the MSPC regarding the Boczar application for a

[5] The DMD was established pursuant to Indiana Code § 36-3-5-4 and is composed of five divisions, including the Division of Neighborhood Services and the Division of Permits. (Rev. Code § 231-108 (1998)).

certificate of appropriateness, including the Logan plans submitted by the Boczars to the MSPC, were stored by the DMD along with other MSPC records.

Apparently, Dr. Boczar took the lead role in initiating the renovation process. She read design guidelines and began interviewing architects and landscape architects. In August 1996, Plaintiffs began the process of obtaining the required approvals from the MSPC and the DMD to conduct a major reconstruction or renovation project on their house. Dr. Boczar filed application for a Certificate of Appropriateness with the MSPC. As required, that application included a set of plans prepared by architect (Steve Logan of Logan and Ramaker) and a landscape architect, describing and illustrating the things the Plaintiffs intended to do to the house in the renovation project. Generally, those plans called for erection of the new façade-French Eclectic with a two-story addition, a three-car detached garage, a front entry turret vestibule and a rear entry mud room/breezeway, the addition to be in limestone and cement plaster with new limestone to resemble the current lower house façade, installation of all new windows, and trim features in gray and ironwork in black or gray around the windows, doors, and wall edges. The project was originally scheduled for review by the MSPC in December 1996 but the lack of a quorum pushed it over to the January 1997 meeting.

On January 31, 1997, the MSPC approved the application and issued a Certificate of Appropriateness. In granting the Certificate, the MSPC ordered that the improvements to the Boczars' property "shall be per plans on file with the Commission." (Compl., Ex. F. ¶ 3.) The Certificate had no expiration date. The MSPC retained the

set of plans submitted with the application and stored them at the office of its Chairman, David Kingen, who is also an employee of DMD. The storage area of MSPC is within DMD offices.

The Boczars then sought bids from at least three contractors. Unfortunately, they had not consulted builders before submitting the plans to the MSPC and had obtained no cost estimates until after the certificate was issued. They were disappointed by the bids they received because the costs were much higher, at about $500,000, then they hoped to spend. Consequently, they shelved the idea of renovation for over a year while they continue to live in the residence moon as it was at the time of their purchase.

The Boczars' interest in renovation was revitalized after a visit to a home show around April of 1998. There, they met G. W. Fowler, a contractor who does business under the name of Diamond Design. They began working with Mr. Fowler, hoping to find a way to get their renovation accomplished. Unfortunately, Mr. Fowler had never been responsible for renovation in an historic district. Dr. Boczar asked Mr. Fowler to look at the restrictions of their certificate of appropriateness and to attempt to design a renovation that could be done for about $200,000. Mr. Fowler was also given prior plans and construction drawings. Dr. Boczar told him because of the redesign from the original plans, DMD might have questions for him about the changes. Mr. Fowler subsequently submitted the plans he had designed to cap DMD, Exhibit 19, and when he was requested to do so, he provided a copy of the certificate of appropriateness. According to Dr. Boczar, she assumed that the changes were significant to DMD, the

agency would tell them and allow them an opportunity to explain that they felt they were still constructing essentially the same house even though the front elevation might look different.

Dr. Boczar was aware that the Fowler plans were different than the plans submitted to the MSPC but she did not consider the differences to be significant. She contends that the items included in the new plans were essentially the same as the old, such as the number of bedrooms, bathrooms, square footage, the finishes, etc., with just what she considered to be a slight reconfiguration. She did concede, though that the location of the garage (to make it attached to the residence) and the addition of a second story living space above it were changes, but intended that this would not affect the total square footage. See also agreed that the elevations appeared different between the two plans and were in fact different. She also conceded that she misjudged the MSPC, thinking that it would be concerned only with the finishes and materials, and did not think it would consider these differences to be substantial.

Dr. Boczar testified that it was her idea to submit the new plans from Fowler to DMD for the issuance of building permit. She also testified that she was not aware that the Certificate of Appropriateness stated that the improvements had to be constructed "per plans on file" with the MSPC, which he attributed the fact that this restriction was on the back page a vague two page, front-and-back certificate.[6] However,

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[6] Mr. Boczar did not see the language heater, at least not until after the renovation efforts had been stopped. However, it appears that his involvement is project was very slight until the stop-work order was issued.

her contractor, G. W. Fowler did notice that language when he received the certificate, but testified that he thought that meant the plans that he was to file with the City, i.e. the "building commission." He did not review the Design Guidelines before preparing or submitting his plans.

In September 1998, the Plaintiffs took the next step in obtaining authority to proceed with the renovation project by applying, through their contractor, to DMD for and receiving Building and Improvement Location Permits. Included as part of the application was the Certificate of Appropriateness and a set of plans. However, the plans submitted to DMD were different than the plans previously submitted to the MSPC--way different. For example, the plans submitted to DMD provided for attached rather than detached garage with living space over the garage, a porte chochere feature attaching the garage to the residence, different window styles, and no trim features around the windows, doors and wall edges.[7] There was also a porch feature along the front of the house that had not been indicated in the original Logan plans. The cost of the project under the newer plans is approximately one-half the cost under the original plans ($500,000 versus $250,000). The Plaintiffs contend that the majority of the cost savings were gained from interior modifications. They also contend that the garage relocation is the result of the prohibition they received from the City that the originally selected site for the garage could not be used because of a drainage concern. According to Mr. Fowler, the permit approval process at the City required a

[7] Mr. Boczar testified that though no trim features were on the plans submitted to DMD, the Boczars intended to have trim features.

consultation with the drainage division. During that consultation, he learned that the detached garage that he had initially designed could not be located where he had designed it because of a yard drainage situation. He then modified his design and drawings to attach the garage to the residence.

The DMD's Division of Permits issued to the Boczars an Improvement Location Permit (Permit No. ILP 98-02645) and a Building Permit (Permit No. STR 98-04908) based on the plans submitted with the Boczars' application for such permits.

Reconstruction and remodeling on the Boczar's house began in early September 1998. The roof was ripped off, including trusses, and reassembled, footers were poured for the garage and a small extension on the back to the house, some framing work was done, and parts of the driveway were dug up. Several supporting walls were also demolished. The footers of the addition were poured and a slap for the garage was poured. The foundation for the new portions of the structure were completed and the exterior walls were framed. Some interior work was performed both in the addition and in the pre-existing structure. (Some electrical work in the pre-existing house was disconnected and work was done on several interior walls.)

The differences between the two plans were brought to the attention of the MSPC and cap DMD. Certain matters regarding the Boczar property was discussed at the November meeting of the MSPC. No notice had been issued that the Boczar property would be discussed at that meeting, either directly to the Boczars or in any form of public notice. It was not an agenda item. However, prior to meeting,

several of the commissioners had been contacted about the Boczar's renovation project by several homeowners in the Meridian Street neighborhood, including the immediate neighbors of the Boczars. Concern was expressed by the callers about whether the renovation was being done in conformance with the certificate of appropriateness. Robert Pinkley testified that he was concerned about the location and orientation of the new Boczar garage, that would be so difficult to get into that it would discourage use and lead to parking in front of the house--a constant concern. He also indicated that Ms. Berger is concerned about the location of the dormer windows in the built, overlooking her bedroom. He also testified that it was his impression that the original plans would have added to the aesthetics of the neighborhood but that the new ones do not, and are, in effect, unsightly. Jane Nolan testified that the plans the MSPC approved were for a French Eclectic style, but what she is seeing built and what has been depicted in the various plans that had been submitted to the MSPC (several) since this "blew up," she cannot tell what the style is--it is not clear that it fits with the aesthetics of the neighborhood. The minutes from the November meeting indicate that MSPC voted to "promote the case" to the City; the minutes do not indicate that the MSPC would call for revocation of the building and improvement location permits.

Around the middle of November 1998, Eugene Lausch, the Director of the DMD, began to see indications that trouble was brewing over the Boczar property. He discussed the situation with Michael Graham, the Washington Township Administrator. Lausch moon and received correspondence from members of both the MSPC and the Meridian Street Foundation, a private group dedicated to the preservation of the Meridian St Street area, and closely aligned with the

MSPC.[8] He also received a copy of correspondence, dated November 15, 1998 from Jane Nolan, Vice President of the MSPC, to Mr. Graham. (Pl.s' Prelim. Inj. Ex. B.). Ms. Nolan's letter indicated that she and Graham had agreed that the site plans for the residence at 4821 N. Meridian Street had been significantly altered since approved by the MSPC in February 1997. It also indicated that Graham had said the roof could be completed to ensure that water damage would not occur, but then a stop work order would be issued until the Boczars submitted and received approval from the MSPC of an accurate plan.

The evidence presented at the hearing establishes that the DMD's Division of Permits revoked the permits issued to the Boczars and issued a stop-work order.[9] James H. Andrews, Jr., the Assistant Administrator for Permits Code Compliance in the Division of Permits authorized and approved of the revocation of the permits. The authority to revoke permits had been delegated to Andrews by the

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[8] In fact, the foundation is allowed to appoint one member of the MSPC. The interests to of these two organizations are very closely aligned.

[9] At the preliminary injunction hearing, in an effort to attack the validity of the revocation letter, the Plaintiffs presented much evidence to establish that Ms. Fields' signature stamp was used on the revocation letter without her knowledge and approval. This matter is a red herring. First, though the stamping of the revocation letter was not specifically assented to in advance by Ms. Fields at the time it was issued under her name, the revocation of permits was authorized by others in the DMD, including Director Lausch and Asst. Administrator Andrews. The authorization of the revocation letter by Lausch and Andrews was based on their discussions with the MSPC and the fact that Boczars had submitted two different plans to the MSPC and DMD. Lausch had an active role in drafting the revocation letter with assistance from David Baker, a City employee and the Administrator of the Division of Historic Preservation of the DMD and architect, and Steve Neff, counsel for the City. Lausch approved of the revocation letter in its entirety. In addition, during her testimony at the evidentiary hearing, Ms. Fields ratified the use of her signature stamp on the revocation letter

Administrator of the Divisions of Permits, Tim George. Also, George was aware of the revocation of Boczars' permits and there's no evidence that he opposed the revocation of the Boczars' permits. In addition, Director Lausch authorized and approved of the revocation. As for the stop-work order, it was authorized by Assistant Administrator Andrews and issued by a DMD inspector on November 13, 1998.[10] Thus, the DMD through its Division of Permits revoked the Boczars' permits and issued the stop-work order.

The stop-work order allowed work to continue on the roof and window openings but provided that all work had to cease upon completion of that work which would enclose the structure as it then existed. The order further provided that it expires by order of City inspectors and work activity may resume when the new plans are submitted and approved by the MSPC. The Boczars' contractor had heard that a stop-work order would be issued and forewarned the Boczars before the order was issued.

Mr. Boczar initially received a stop-work order on November 13th but did not tell Dr. Boczar about it for approximately two weeks. Upon learning of the stop-work order, Dr. Boczar flew back to Indiana to attempt to get the order rescinded.

After receiving the stop-work order, Mr. Boczar contacted Mike Graham, Washington Township Administrator. Mr. Boczar told Graham that none of the authorized grounds for issuing a stop work order were met in this instance because

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[10] A permit revocation letter is unnecessary to make the stop-work order become effective.

they deal primarily with defects in construction, and what the City had listed as the reason for the stop order was not among the authorized grounds. Graham's response was something to the effect that "was what it was and that is it. Graham did not advise Boczar of any right to appeal the stop work order." Neither Graham, the inspector, Jeff Parmalee, who had delivered the stop work order, nor anyone else advised Mr. Boczar that he had a right to be heard after receiving the stop-work order. In fact, Graham told him that what he needed to go back to the MSPC to obtaining new or amended Certificate of appropriateness.

Mr. Fowler also contacted several individuals at DMD, including Mr. Graham and David Kingen, in an effort to resolve the problems which prevented the work from going forward. Graham told him that a letter or Certificate of the Appropriateness from the MSPC would be needed to correct the problems. Kingen told him that the proper approach was to file for an amendment of the Certificate of Appropriateness they had received. Mr. Boczar immediately sent a letter to Kingen asking to have their matter placed on the next available agenda of the MSPC.

Eugene Lausch met with various members of the DMD staff in addition to Michael Graham to discuss the Boczar property. One of those consulted was David Baker, a city-employed architect, who assisted in describing the differences between the original plans filed with the MSPC and one's filed with the DMD in connection with the permit process. Both sets of plans were reviewed and with analyzed by various people with DMD during this process. Also, lawyers on the staff with the City reviewed the

matter. It was unusual, and perhaps even unprecedented, that the Director of DMD was personally involved in the drafting of a letter of revocation of building permits.

Both sets of plans were physically located at DMD. The MSPC was chaired by David Kingen who was also an employee of the DMD. MSPC records, including plans associated with certificates of authority were physically stored at Kenyan's DMD office. However, Kingen with, in his capacity as MSPC chair was responsible for the maintenance of the records, not the DMD. Thus, although both sets of plans were present in the DMD offices in the City-County Building in Indianapolis, the MSPC plans were not readily available for review by those considering building permit applications contemporaneous with the application process.

A letter (the "revocation letter") from Rhonda J. Fields, Manager of Permit Issuance in the Division of Permits of the DMD was issued to the Plaintiffs on November 23, 1998.[11] (Pls' Ex. A at 1.) The revocation letter notes that the plans submitted to the DMD along with the Plaintiffs' application for an Improvement Location Permit and Building Permit by their contractor G. W. Fowler substantially differ from the plans approved by the MSPC, thus requiring the revocation of the permits. It states: "In order for [the DMD] to reinstate the permits, you will need to obtain approval from the [MSPC] of revised plans that conform to the work being done on your property." (*Id.*) The DMD allowed certain work to be completed in order to secure the house from the

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[11] The letter is on the letterhead of the Division of Neighborhood Services.

weather, subject to change after the MSPC reviews the revised plans. (Id. at 2.)[12] This included completion of the roof to an extent, although the Boczars contend that because of limitations placed on the roofing completion by the City is still not watertight. They contend that the change in the pitch of the roof (from a 4-12 to a 12-12 pitch) requires that the chimneys (two) be extended to allow them to be vented through the new roof-which the City had refused to allow to this point. They contend there are leaks around one of the chimneys where it was cut through in preparation for extension which has not been allowed to be completed. The revocation letter also prohibited "Any and all interior work such as framing, plumbing, electrical, dry walling or flooring...." (Id.) It warned that the performance of any work not specified therein would result in additional enforcement action, including a review of the license of the Boczars' contractor Mr. Fowler by the Indianapolis Contractor's Board. (Id.)[13] The Boczars were advised to contact Mr. Graham, the Washington Township Administrator, if they had any questions regarding the revocation of their permits. The Boczars received the original revocation letter by certified mail the day after Thanksgiving. A copy of the letter, however, had been sent by facsimile to their contractor who sent to the Boczars a copy the day before Thanksgiving. No one informed the Boczars in advance of the revocation letter that their permits were to be revoked. Upon receiving the letter, they were not notified of any right to appeal the revocation.

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[12] This was the completion of roof decking and laying of shingles, completion of dormers and soffits, the framing of windows and covering window openings with plywood or glass.

[13] The Indiana Contractor's Board is part of the DMD and has the authority to suspend or revoke contractors' licenses.

The permit revocation letter refers to substantial differences between the two sets of Boczar plans. Lausch concedes that there is no clear definition of what differences are "substantial" and that a degree of subjective judgment is involved. The difference that DMD (and he) considered to be substantial are identified in the November 23rd letter to the Boczars.

After receiving the revocation letter, Mr. Boczar responded by writing a letter dated November 25, 1998, to Mayor Goldsmith advising him of the dispute and challenging the DMD's authority to revoke the permits it had issued to the Plaintiffs.

Mr. Boczar also contacted Lausch who advised him to go to the MSPC with the new plans for approval. Lausch did not advise him of any right to appeal the stop-work order or the revocation of the permits. Boczar and Lausch had several telephone conversations. During his testimony at the preliminary injunction hearing, Lausch indicated that there's no structured review process for the appeal of a revocation of a building permit.

On December 21, 1998, a meeting was held among Dr. Boczar, accompanied by an attorney the Boczars had hired to assist them in dealing with this problem, Lawrence Reuben, Lausch, Graham and Jeff Sirmin (an attorney) from DMD, David Baker the Administrator of Indianapolis Historic Preservation Commission, and an attorney who had been a member of the MSPC, Fred Schlegel, who was believed to be knowledgeable about the MSPC process. The meeting's purpose was to resolve the problems of the Boczars' partially completed house and identify a plan which was both

satisfactory to the Boczars and likely to be approved by the MSPC. The meeting did not result in the reinstatement of the building permit.

On Dec. 22nd, 1988, after the meeting and after the Boczars requested to be at least allowed to make their house water tight, Lausch issued a letter which allowed them to continue with interior work within the footprint of the original house (Exhibit 9). Dr. Boczar instructed the contractor, Mr. Fowler, to do certain things permitted by the City to seal the structure but he declined to do so.[14] Dr. Boczar did not contact any other contractors in order to try to have that sealing work done. The Boczars continued to contact the City through the winter of '98-99' to try to get permission to do additional things to close in the house. The Boczars also petitioned the mayor, City-County councilmen, a congressman and others seeking their intervention.

Mr. Boczar then contacted Kingen of the MSPC, who advised him he needed to come before the MSPC and seek an amendment to the Certificate of Appropriateness that the Boczars had received. Kingen did not advise of any appeal rights.

In December 1998 and January 1999, Lausch and Kingen had conversations about the Boczars' property.

The Boczar matter was put on the MSPC's agenda for December 1998. Mr. Boczar and his counsel made a presentation to the MSPC at the December meeting

[14] The roof, shingles, dormers and soffits as well as minor interior framing had been completed on the Boczars' house since the stop-work order was issued.

asking for an amendment to the Certificate. The MSPC decided they lacked sufficient information with which to make a decision, so that the matter was continued to a special meeting of the MSPC in January 1999.

The Boczars made another presentation at the January special meeting. The MSPC took no action on the requested amendment to Certificate, citing insufficient information.

Following the January 1998 of the MSPC, Mr. Boczar again contacted Kingen seeking advice on what the Boczars should do next.[15] Kingen advised that the Boczars should attempt to meet the MSPC's information requirements.

At the February 1999 meeting of the MSPC, it was suggested that the Boczars meet with one or more of the commissioners to go over the plans. Mr. Boczar then met with David J. Halvorson, one of the MSPC's members. A meeting was held at the Boczar home with individuals from the City, the Boczars' contractor and others about the matter. Other meetings were held as well.

The Boczars' application for an Amendment to their Certificate of Appropriateness was on the agenda for and discussed during the MSPC's May 18, 1999 meeting. The MSPC denied the petitioned for an amended Certificate and told the Boczars that because of the difference between the two plans, they should reapply for a new Certificate of Appropriateness based on the revised plants. The MSPC's Order Denying Amendment to Certificate of Appropriateness,

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[15] Before the special meeting which was held on Jan. 6, 1999, Kingen had recused himself from the MSPC's proceedings dealing with the Boczar property.

issued on May 25, 1999, provides in pertinent part:

2. The Amendment to the Certificate of Appropriateness requested approval to erect a new façade, addition of second floor and attic addition of a 3 car garage, low stone wall and lights topped by iron fence and gate. Such improvements are per drawings on file with the Commission.
3. Said requested amended improvements are not appropriate to the preservation of the area comprised of Meridian Street and bordering properties or non-complying with the architectural and construction standards in said area. Only those improvements granted in the original Certificate of Appropriateness granted in January, 1997 are permissible.
4. The amendment to the Certificate of Appropriateness requested by the applicant should be DENIED.

(Trial Br. Anticipating Mot. For Involuntary Dismissal, Ex. A.) It was the Boczars understanding that the MSPC considers the main problems with their amended plans to be the appearance of their redesigned garage, how it appears from the street and from the property of their neighbor to the North, the Bergers. Robert A. Pinckley testified that, based on his understanding of the MSPA, the Boczars could seek judicial review of the May 1999 decision. The original Certificate of Appropriateness remains in effect.

The Plaintiffs presented evidence of the degree of changes that can be made from plants on file with the MSPC before the MSPC requires an amendment to certificate of appropriateness, which the court refers to as "by comparison" evidence. Part of this "by comparison" evidence related to the property at 4810 North Meridian, owned by Edwin W. Free, III. In 1995,

the Frees saw a certificate of appropriateness for the renovation of a two car, concrete block garage. Their plans called for the conversion of it to a three car garage with a gable roof, add siding over the concrete block exterior and add some windows. They obtained the certificate and then submitted plans with minor modifications to the City to obtain the appropriate construction permits. The City granted the permit. The construction was started around Labor Day 1998. At some later point, David Kingen contacted the Frees, indicating that there was the complaint about the structure. By the time Kingen contacted the Frees, the renovation was nearly completed. The Frees agreed with Kingen that there was a difference between what they had submitted and what they had constructed. The difference was quite small, principally relating to the third bay of the garage, building it 4 feet, 4 in. larger to the south and 4 feet larger to the east than indicated in the filing with the MSPC. The Frees also added columns to the front of the garage that matched the columns on the front of their house, adding two extra windows and a small extra gable in the roof over the extra four feet to the east. Mr. Kingen indicated that the structure "exceeded the limitations for a variance." On instructions from Kingen, Frees applied to the MSPC and the City for what Free described as a "variance" but which the court understands to be an amendment or modification of the certificate and building permit. After several continuances from meeting to meeting of the MSPC, the modification was approved in May 1998. By the time the modification was approved, the building was completed. Mr. Free referred to it as a ratification of what they had done. The Frees were not issued a "stop work" order nor where they ever notified that their building permit was revoked. The modifications of the garage did not alter the function or usage of the structure, style or the fundamental orientation. It was

originally submitted as a garage structure with three bays, not be used as a residential structure, and remained such despite the modifications.

There was also reference to the Vignatti property at 5617 North Meridian and TV "birdcage" structure and basketball goal at the Governor's residence. Kingen conceded that certificates of appropriateness were probably not obtained but he also testified that the MSPC had never tried to regulate basketball goals and that with respect to landscape/gazebo/sculpture like things, the MSPC interest or jurisdiction depended upon whether the object was permanent--the less permanent, the less interest.

There was also reference to the Berger property next door to the Boczars, specifically regarding walkways. Kingen testified that he determined that the walkways were merely a replacement or maintenance of existing walkways so that a certificate was unnecessary. He also testified that there had been instances in which the requirements for the submission of certain materials with applications for certificates have not been strictly enforced.

Most of the commissioners said that the degree of change before an amendment is needed is subjective. They also, for the most part, said they do not recall any other matter in which they were differences of this magnitude, and some said there never were situations when there were differences. There is also some confusion about whether the MSPC has jurisdiction over the rear of structures, that is, the portions which are not with "line of site" from Meridian--Pinkley thought not but others thought they did. In testifying about how the MSPC evaluates matters submitted

for certificates, he indicated that the commission tries to avoid "setting precedent which might lead to future things happening that we're not as happy with as we might be." (Trial Tr. Vol. II at 311.) Dorfman said he is concerned with the size and location of the Boczar garage, it sits too far forward on the property and is too large for the structure. Commissioner David Halvorson, the architect, described the "new" design, that is, the house being constructed by G. W. Fowler as not fitting any of the aesthetic characteristics or styles that the MSPC was interested in promoting. He said it was a combination of several styles but did not fit neatly into any one style. (Halvorson Dep. at 102-103.) This is a large part of what makes it unacceptable to the MSPC. The commissioners generally expressed a willingness to be more lenient in approving changes for ranch style houses than for more historically significant houses such as those built in the '20s. There is a definite bias against parking in the front of the house. They (including Kingen) also expressed that they felt they had jurisdiction over the interior of home changes, especially if it would affect the use of the structure, i.e. if it could become a multi-family dwelling. One Commissioner, Berhoozi, said that is why the statute was passed with--to limit and control the usage.

II. Conclusions of Law

Before marching through the analysis of each of the Plaintiffs' claims, a few words need to be written regarding what this suit is about and what it is not about. This is because the crux of the Plaintiffs' claims has had an evolving character to it. When the suit was first filed, the Plaintiffs were challenging the enforceability of a stop-work order issued by the City after the City and the MSPC learned that the plans submitted

by the Plaintiffs did not match up with the plans submitted to and approved by the MSPC. Subsequently, after the case was removed to this court, the Plaintiffs abandon any efforts to proceed with construction under the authority of the earlier issued Certificate of Appropriateness. They did this by seeking an Amendment to the Certificate, based on their newer and cheaper plans. More subsequently, they dumped the lawyer who had been representing them in this action and before the MSPC, and began charting their own course in this litigation. And that leads to what this case is not about--that is, a challenge to the process or issuance of the original Certificate of Appropriateness and building permits, or the Certificate or permits themselves. The Plaintiffs cannot challenge those because they received them and use them. What this case is about is the revocation of the building permits and their inability to obtain an Amendment to the Certificate of Appropriateness which was issued in a still valid. It is in that setting that the court focuses on the issues relevant to this dispute.

The court can quickly dispose of one of the State Defendants' many arguments. They claim that the MSPC members' actions taken during the Nov. 17th 1998 meeting of the MSPC constitute an exercise of their First Amendment rights to petition the government. They contend, therefore, that they are immune from suit under the *Noerr-Pennington* doctrine established by *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), and *Eastern R.R. Presidents Conference v. Noerr Motor Freights, Inc.*, 365 U.S. 127 (1961), and recently addressed by the Seventh Circuit in *Tarpley v. Keistler*, 188 F.3d 788 (7th Cir. 1999). Whether the MSPC members' actions in seeking revocation of the Boczars' permits and a stop-work order

are entitled to *Noerr-Pennington* communicate is not an issue in this case. Even if such actions were entitled to immunity, sets immunity would not entitled the MSPC members to judgment in their favor on the Plaintiffs' remaining claims in this case.

Another defense argument is also easily dispatched. The City Defendants argue that defendants Kingen and Halvorson cannot be held individually liable under Count I because the MSPC's decisions challenged by the Plaintiffs are official acts. This argument is untenable. *See, e.g., Hafer v. Melo*, 502 U.S. 21, 26-28 (1991) (rejecting argument that auditor general cannot be held personally liable under Section 1983 for discharging employees because she acted in her official capacity).

The City Defendants further contend that Kingen and Halvorson are entitled to quasi-judicial immunity for their actions, and the State Defendants contend that the Commissioners are entitled to quasi-judicial immunity on the state law claims. In its Entry On Motion to Dismiss and again during the final pretrial conference, the court indicated that understood Count I to allege a violation of federal law rather than state law. *(See, e.g., Entry on Motion to Dismiss at 24.)*. At the final pretrial conference, the Plaintiffs confirmed this view by stating that their theory under Count I is that the MSPC's decisions are unconstitutionally vague, arbitrary and capricious in violation of the Fourteenth Amendment. Because only the federal claim for equitable relief against the MSPC members individually remains under Count I, the court does not address the immunity arguments here.

A. Count I: The Constitutionality of the MSPA

1. Questionable Challengers

There are number of reasons why this court should not even reach the question of whether the statute creating the MSPC is unconstitutionally vague. First, the Plaintiffs' facial challenge was not raised until very late in the game. On August 31, 1999, upon filing Plaintiffs ' Submissions Pursuant to Case Management Plan And Order of the Court at Telephone Pretrial, one week before the commencement of trial, the Plaintiffs for the first time indicated they were asserting both a facial and "as applied" challenge to the statute. Through all this litigation prior to that late date, it appeared that the Plaintiffs were only challenging the application of the statute to their renovation project. The court would hesitate to declare a state statute facially unconstitutional when the claim entered the case through the backdoor. Second, though available, the Plaintiffs elected not to pursue their state remedy. Under Indiana Code § 36-7-11.2-64 (a), the Plaintiffs had sixty days within which to see judicial review in state court of a final determination by the MSPC. The MSPC's Order of May 25, 1999 denying their amendment to their Certificate of Appropriateness is a final determination, and Plaintiffs did not seek such review within 60 days of the date of the order. As stated, this failure is not insignificant.

Finally, the Plaintiffs do not appear to be the proper parties to challenge the statute's validity. "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be

applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court. "*Broadnick v. Oklahoma*, 413 U.S. 601, 610 (1973); *see also New York ex rel. Hatch v. Reardon*, 204 U.S. 152, 160-61 (1907); 5 Ronald D. Rotunda & John E. Nowak, Treatise On Constitutional Law § 23.10 at 246 (3d ed. 1999). In addition, courts will not decide the constitutionality of a statute if the plaintiff has voluntarily accepted the provisions of the statute and avail himself or herself of the statute's benefits. *See, e.g., Great Falls Mfg. Co. v. Garland*, 124 U.S. 581, with and 597 (1888); Treatise on Constitutional Law § 23.10 at 246.

When the Boczars purchased the property at 4821 North Meridian Street, they planned on making renovations and were well aware that it was with in a historic district. In fact, their realtor had warned them that it was difficult to get approval for renovations in that district. Dr. Boczar read the design guidelines and interviewed architects. She applied for a Certificate of Appropriateness and submitted a set of plans prepared by an architect and landscape architect, illustrating their planned renovation, as required by the MSPC. The Boczars were granted a Certificate of Appropriateness in January 1997; thus, they were able to and did, in fact, satisfy the MSPC's standards for granting such certificates. The standards were not so vague so as to prevent them from obtaining a certificate in the first instance. Furthermore, the Boczars avail themselves of the process for amending their original certificate and went before the MSPC with their new set of plans. The MSPC has apprised them of why the amendment was not granted and the Boczars understood the main problems (as

viewed by the MSPC) with their proposed amendment. The MSPC's order denying the amendment informs the Boczars of the basis for that denial.

By purchasing the property subject to the MSPA, applying for and receiving a Certificate of Appropriateness, and applying for an Amendment thereto, the Boczars have voluntarily accepted the provisions of the MSPA and avail themselves of the statute's benefits.[16] The problem with the Boczars' proposed Amendment is not an inability to determine what factors the MSPC considers to determine whether the amendment should be granted or what changes the Boczars could make to plans in order to obtain the MSPC's approval. Rather, the "problem" is that the MSPC and the Boczars simply disagree about whether their proposed amended plans are appropriate for the area. Even assuming that the statute creating the MSPC is void for vagueness, the Boczars have not shown that they were aggrieved by any vagueness in the statute. They therefore do not appear to be appropriate plaintiffs to challenge the constitutionality of the MSPA

But these reservations about the appropriateness of these Plaintiffs as challengers to the constitutionality of the MSPA will be overlooked. An examination of their challenge shows it to be meritless.

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[16] Of course, the Boczars benefit from the fact that their neighbors and owners of other property subject to the MSPA cannot engage in construction, alteration or demolition without the MSPC's approval. This protects the Boczars' interest and enjoyment gained by living in and owning property in the historic district.

2. Meritless Challenge

The Plaintiffs claim that the statute creating the MSPC is unconstitutional, both facially and as applied to their property. Following the court's Entry on Motion to Dismiss, only the claim for equitable relief against the MSPC members individually remains.

A law is void for vagueness and, therefore, violates due process, "if men of common intelligence must necessarily guess at its meaning and differ as to its application[.]." *Connally v. General Const. Co.*, 269 U.S. 385, 391, (1926); *see also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 44, (1991); *Grayned v. City of Rockford*, 408 U.S. 104, 108, (1972); *Karlin v. Foust*, 188 F.3d 446, 458 (7th Cir. 1999). "The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the *criminal* consequences of their conduct." *Jordan v. De George*, 341 U.S. 223, 230, (1951) (emphasis added); *see also Grayned*, 408 U.S. at 108 (stating "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited"). Therefore, "the doctrine's chief application is in respect to criminal legislation," *Lopez-Lopez v. Aran*, 844 F.2d 898, 901 (1st Cir. 1988); however, the doctrine also has been applied to laws implicating fundamental constitutional rights, especially First Amendment rights. *See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, (1982); *Waterman v.* Farmer, 183 F.3d 208, 212 n. 4 (3rd Cir. 1999); *Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 739 (7th Cir. 1987); *Walker v. Bain*, 65 F. Supp. 2d 591, 598 n.3 (E.D. Mich. 1999) (observing and that of the 51 Supreme Court cases substantively addressing vagueness, only 4 arose outside the criminal law or First Amendment context).

Laws to the to that neither impose criminal penalties nor implicate fundamental constitutional rights are subject to a less strict vagueness test than those laws that do. As the Supreme Court explained:

> The degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depend in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or to by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.

Hoffman Estates, 455 U.S. at 498-99 (footnote omitted). Moreover, a law that does not implicate constitutionally protected rights is unconstitutionally vague only if it "is impermissibly vague in all of its applications." *Hoffman Estates*, 455 U.S. at 495, 497; *see also United States v. Salerno*, 481 U.S. 739, 745, (1987) (stating that a law "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.") Furthermore, to be unconstitutionally vague, a law must be vague "'not in the sense that it [establishes] an imprecise but comprehensible normative standard, but rather in the sense that no standard ... is specified at all." *Record Head Corp. v. Sachen*, 682 F.2d 672, 676 (7th Cir. 1982) (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)); *see also Hoffman Estates*, 455 U.S. at 495 n.7.

When deciding whether a state law is void for vagueness, the availability of a state court or state administrative process to clarify the meaning of a state law is a relevant consideration. *See id. at 498.* Additionally, "in evaluating a facial challenge to a state law, a federal court must ... consider any limiting construction that a state court or enforcement agency has proffered." *Id.* at 494 n.5*; see also Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989); *Grayned*, 408 U.S. at 110.

The statute creating the MSPC does not impose any criminal or civil penalties. It does not impinge any fundamental constitutional right. Instead, the statute establishes the MSPC and sets forth standards to be applied to construction, alterations demolition of structures within the area subject to the MSPA. Thus, the law will tolerate a certain degree of vagueness in the statute. Upon considering the MSPA as a whole and requiring less exactitude than would be required of a criminal statute or one impinging fundamental constitutional rights, the court concludes that the statute is not vague in the constitutional sense.

Canons of statutory construction can provide some guidance and comfort in determining whether the challenged statute is unconstitutionally vague. In the absence of statutory definition, words and phrases are to be given their plain and ordinary meaning. *See Matter of Merchants Grain, Inc. By and Through Mahern*, 93 F.3d 1347, 1353-54 (7th Cir. 1996), *cert. denied, 519 U.S. 1111 (1997); Kosciusko County Bd. of Zoning Appeals v. Smith*, 724 N.E.2d 279, 2000 WL 215539, at *2 (Ind. Ct. App. 2000); ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 25 (1997). The "court must not be guided by a single sentence or member of a sentence, but [must] look to the provision of the whole law, and to its object and policy." *Grammatico v. United States*, 109 F.3d 1198, 1204 (7th Cir. 1997); *accord Bemenderfer v. Williams*,

720 N.E.2d 400 (Ind. Ct. App. 1999). Under the canon of *ejusdem generis*, where general terms follows specific terms, the general terms should be understood as restricted in meaning to things that are similar in nature to the ones enumerated by the specific terms. *See Norfolk & W. Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991); *Grammatico*, 109 F.3d at 1204; 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.17 at 188 (5th ed. 1992); MIVKA & LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 24. This principle generally is applied when the general language follows the specific terms, but it is equally applicable when the general terms precede the specific terms. 2A SUTHERLAND STATUTORY CONSTRUCTION § 47.17 at 188. In addition, the maxim *noscitur a sociis*, that a word is known by the company it keeps, is often applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to a legislative act. *See Newsom v. Friedman*, 76 F.3d 813, 820 (7th Cir. 1996) (internal quotation marks and citation omitted); 2A SUTHERLAND STATUTORY CONSTRUCTION § 47.16 at 183. The court should construe a statute to be constitutional if at all possible. *See Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 508 (7th Cir. 1998), *certified question answered by* 714 N.E.2d 135 (Ind. 1999). But in the end, it is not the simplicity of any particular canon of construction which demonstrates the constitutional soundness of this Act. Rather, it is a careful reading of the Act in its entirety against the panorama of case law evaluating other legislative acts against the test of vagueness which defeats the Plaintiffs' arguments.

Though certain terms in the statute are general or imprecise, see IND. CODE § 36-7-11.2-59(1) ("substantially greater density"), 36-7-11.2-59(2) ("substantially smaller or larger in size and scale"), 36-7-11.2-59(3) ("significantly less than the average

setback"), 36-7-11.2-59(7) ("substantially encroach upon the view and exposure"), 36-7-11.2-61(a) ("a structure or feature" and "reconstruct, alter, or demolish"), they are not so vague so as to specify no standard at all. These terms are not defined in the statute and, therefore, are to be given their plain and ordinary meanings. Any question as to their plain and ordinary meanings can easily be answered by ready reference to any English dictionary. These terms are understandable by persons of ordinary intelligence and do not create an ambiguity where none exists.[17] *See, e.g., Cruz v. Town of Cicero, Ill.*, 1999 U.S. Dist. LEXIS 11598, No. 99 C 3286, 1999 WL 560989, at *16 (N.D. Ill. Jul. 28, 1999) (holding phrase "substantially alter" in city zoning ordinance not unconstitutionally vague).

The Plaintiffs also challenge the following provision as unconstitutionally vague:

> In determining appropriateness, the commission shall consider, in addition to other factors that the commission considers pertinent, the historical and architectural style, general design, arrangement, size, texture, and materials of the proposed work and the elation of the proposed work to the architectural factor of other structures in the area.
> IND. CODE § 36-7-11.2-61(c).

The factors specifically enumerated in this provision are akin to terms in historic preservation laws that have withstood constitutional vagueness challenges. *See, e.g., Mayes v. City of Dallas*, 747 F.2d 323, 325 (5th Cir. 1984) ("harmonize with the structure's

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[17] It is noted that the Boczars are extremely well-educated trained professionals. Linda Morrison Boczar is a medical doctor and currently practices medicine. James Boczar is trained as a lawyer, has served as a member of the Florida legislature, and currently teaches at a college. Certainly, their ability to comprehend the meaning of these terms exceeds that of persons of average intelligence

facade," "complement the overall character of the District," "architecturally and historically appropriate," and "compatible and harmonize with the existing structures in the block"); *Burke v. City of Charleston*, 893 F. Supp. 589, 612 (D. S.C. 1995) ("intense or lurid colors, a multiplicity or incongruity of details resulting in a restless and disturbing appearance, and an absence of unity and coherence not in consonance with the character of the existing structure"), *vacated on other grounds* (lack of standing), 139 F.3d 401 (4th Cir. 1998); *Park Home v. City of Williamsport*, 545 Pa. 94, 680 A.2d 835, 838 (Pa. 1996) ("the effect of the proposed change upon the general historic and architectural nature of the district" and "the appropriateness of exterior architectural features"); *Bellevue Shopping Ctr. Assocs. v. Chase*, 574 A.2d 760, 763 (R.I. 1990) ("historic or architectural value or significance of the structure and its relation to the historic value of the surrounding area," "relationship of the exterior architectural features of such structure to the rest of the structure and to the surrounding area," and "general compatibility of exterior design, arrangement, texture and material"); *Second Baptist Church v. Little Rock Hist. Dist. Comm'n*, 293 Ark. 155, 732 S.W.2d 483, 486 (Ark. 1987) ("obviously incongruous with the historic aspects of the District") (emphasis omitted); *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444, 452 (N.C. 1979) ("incongruous with the historic aspects of the district") (emphasis omitted); *South of Second Assocs. v. City of Georgetown*, 196 Colo. 89, 580 P.2d 807, 810 (Colo. 1978) ("the effect of the proposed [change] upon the 'general historical and/or architectural character of the structure or area' ... [and] the architectural style, arrangement, texture, and material

used on existing buildings or structures ... and their relationship to other structures in the area"); *Figarsky v. Historic Dist. Comm'n*, 171 Conn. 198, 368 A.2d 163, 170 n.3 (Conn. 1976) ("A certificate of appropriateness may be refused ... [if] in the opinion of the commission, [it] would be detrimental to the interest of the historic district."); *City of Santa Fe v. Gamble-Skogmo*, Inc., 73 N.M. 410, 389 P.2d 13, 19 (N.M. 1964) ("harmony with adjacent buildings, preservation of historical and characteristic qualities, and conformity to the Old Santa Fe Style"); *U-Haul Co. v. City of St. Louis*, 855 S.W.2d 424, 426 (Mo. Ct. App. 1993) ("generally compatible with the style and design of surrounding improvements and conducive to the proper architectural development of the community"); *Life Concepts, Inc. v. Harden*, 562 So. 2d 726, 728 (Fla. Dist. Ct. App. 1990) ("compatible with the surrounding residential uses"); *Bohannan v. City of San Diego*, 30 Cal. App. 3d 416, 424-25, 106 Cal. Rptr. 333 (Cal. Ct. App. 1973) ("in general accord with the appearance of the structures built in Old San Diego prior to 1871," "designs prevailing during the principal recognized Old San Diego Historical periods," and "conform in appearance, size, position and design to the quaint and distinctive character of Old San Diego District, and ... not injuriously affect the same"); *Salvatore v. City of Schenectady*, 530 N.Y.S.2d 863, 865 (N.Y. App. Div. 1988) ("relationship of the proposed exterior design ... to the historic value and architectural style and character of buildings and structures in the surrounding area," "compatible with the size, scale, material and character of the property, neighborhood or environment"). These authorities are persuasive. Based on these decisions, the court finds that the factors enumerated in § 36-7-11.2-61(c) are of sufficient definiteness so as to convey their meaning to persons of ordinary intelligence.

Thus, these specific factors in § 36-7-11.2-61 do not render the statute unconstitutionally vague.

Slightly more problematic is the provision's phrase "other factors that the commission considers pertinent." A Florida court has held a similar phrase in a city zoning ordinance regulating the sale of alcoholic beverages to be impermissibly vague. *See Effie, Inc. v. City of Ocala*, 438 So. 2d 506, 509-10 (Fla. Dist. Ct. App. 1983) ("all other pertinent factors that may arise in connection with the particular application and location being considered"). This decision, however, is not persuasive. It is distinguishable on many grounds, including, but not limited to, the subject matter of the regulation and the context of the general "other factors" aspect of the Ocala ordinance. Reading the MSPA as a whole and keeping its overriding purpose in mind, leads to a different conclusion in the instant case.

Whether examined under the principles of *ejusdem generis* and *noscitur a sociis* or through the lens best suited to the examination of a vagueness challenge to a civil land use regulation as discussed above, the general phrase "other factors that the commission considers pertinent" should be understood to be restricted in meaning by the specifically enumerated factors that follow in the provision. Thus, the "other factors that the commission considers pertinent" are factors akin to those factors specifically enumerated in the statutory provision, *e.g.*, historical and architectural style, general design, and arrangement. Furthermore, the phrase should be construed so as to further the purpose of the MSPA, which in essence is to preserve a historic, scenic, esthetically pleasing and unique area from deterioration and improper change and to

promote orderly and proper land usage. *See* IND. CODE § 36-7-11.2-1. The "other pertinent factors" should be construed as factors that further this stated purpose. As thus limited, the "other pertinent factors" phrase is not unduly vague and does not confer unfettered discretion on the commissioners.

Moreover, the Plaintiffs have not presented any evidence to establish that their petition for an Amendment to their Certificate was denied on the basis of these "other pertinent factors," rather than on the basis of the factors specifically enumerated in the statute. Thus, even assuming that the phrase "other factors that the commission considers pertinent" is unconstitutionally vague, the Plaintiffs have not shown that they were aggrieved by any such vagueness. The Boczars will not be heard to complain of the vagueness of the phrase as it might be applied to the certificates of appropriateness of others. *See Village of Hoffman Estates*, 455 U.S. at 495; *Salerno*, 481 U.S. at 745.

The Plaintiffs' vagueness claim is also based on the lack of any substantive rules adopted by the MSPC. As the Plaintiffs point out, the statute provides that the MSPC "shall" adopt and promulgate rules and regulations "necessary, desirable, or convenient to the orderly administration of commission affairs and to the implementation of [the statute]." IND. CODE § 36-7-11.2-27. The MSPC has adopted and promulgated procedural rules. *See* IND. ADMIN. CODE tit. 925. The absence of substantive rules, however, does not render the statute itself unconstitutionally vague. Nor does the lack of substantive rules necessarily make the decisions of the MSPC arbitrary and capricious. In considering the Plaintiffs' claim that the statute is impermissibly vague, their failure to avail themselves of state available review of the MSPC's decision

denying their Amendment is not insignificant. Had the Plaintiffs sought judicial review of the MSPC's denial of their petition for an Amendment to their Certificate, the state court could have easily construed the Act in a way that would have avoided any ambiguity or vagueness in the statute.

The Plaintiffs maintain that the MSPC has inconsistently applied and enforced the MSPA, thus demonstrating its vagueness. This is the "by comparison" evidence discussed earlier. Of course, when determining whether a statute is impermissibly vague, the court's focus is on the words themselves. *See Hoffman Estates*, 455 U.S. at 503 ("The principal inquiry is whether the law affords fair warning of what is proscribed.") However, the court may also consider whether the statute has been applied in an arbitrary manner. *Cf. id.* (noting that emphasis on the law's text is required in a pre-enforcement challenge because in such circumstances danger of arbitrary enforcement could only be "speculative"); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (noting that doctrine focuses on both notice and arbitrary enforcement); *Rafael Convalescent Hosp. v. Shalala*, 1998 U.S. Dist. LEXIS 5657, No. C 97-1967 FMS, 1998 WL 196469, at *4 (N.D. Cal. Apr. 15, 1998); *Bass Plating Co. v. Town of Windsor*, 639 F. Supp. 873, 881 (D. Conn. 1986) (concluding that "the inconsistent application of the standards further illustrates their indefiniteness"). The Plaintiffs have produced the minutes of the MSPC's meetings and decisions with respect to other certificates of appropriateness in an effort to establish arbitrary and capricious application and enforcement. Their efforts are to no avail. The evidence establishes that in no other case were the changes to

plans approved by the MSPC of the same order or magnitude as the changes to the Boczars' original plans.

Even if this evidence demonstrates arbitrary application or enforcement, which it fails to do, the Plaintiffs do not prevail on their claim that the statute is void for vagueness. They have cited not a single case, and the court's own research has not found one, in which a statute was held unconstitutionally vague solely because of evidence of arbitrary or inconsistent enforcement. It is the risk of arbitrary enforcement inherent in a vague law rather than actual arbitrary enforcement of a clear law that is targeted by the vagueness doctrine. Support for this view can be found in Supreme Court decisions, including *Grayned*:

> If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

408 U.S. at 108-09; *see also Kolender*, 461 U.S. at 357 (stating "the void-for-vagueness doctrine requires that a penal statute define the criminal offense ... in a manner that does not encourage arbitrary and discriminatory enforcement"); *Smith v. Goguen*, 415 U.S. 566, 576 (1974) (stating "where inherently vague statutory language permits such selective enforcement, there is a denial of due process."); *Papachristou v. City of* Jacksonville, 405 U.S. 156, 170 (1972) ("Where ... there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and

encourages an arbitrary and discriminatory enforcement of the law.") Thus, the danger of arbitrary and discriminatory enforcement presupposes that the law is vague. Even the Plaintiffs acknowledge that "for an agency of government to act in a [sic] arbitrary and caprious [sic] fashion, the statute under which they are operating must be in some sense vague." (Closing Arg. of Pls. Linda Morrison Boczar and James J. Boczar at 2.) The court would decline to hold the statute unconstitutionally vague solely based on evidence of arbitrary enforcement, even if there was any such evidence. *See Rafael Convalescent Hosp.*, 1998 WL 196469, at *4. Evidence of arbitrary enforcement seems better suited to an equal protection claim. *See Village of Willowbrook v. Olech*, 528 U.S. 562 (U.S. 2000). The Plaintiffs, however, have never pled or argued an equal protection claim in this case; no such claim was brought to trial.

The MSPA does allow for some flexibility and the exercise of discretion by the MSPC when determining whether to grant a Certificate of Appropriateness, but "perfect clarity and precise guidance have never been required even of regulations that restrict [fundamental constitutional rights]." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989); *see also Grayned*, 408 U.S. at 110 (stating that "condemned to the use of words, we can never expect mathematical certainty in our language"). The court holds that the statute creating the MSPC, Indiana Code § 36-7-11.2-1 *et seq.* is not unconstitutionally vague and, therefore, the MSPC members are entitled to judgment in their favor on the equitable claims in Count I.

B. Count III: The Stop-Work Order and Permit Revocation

The Plaintiffs claim that the City Defendants lacked the authority to revoke their building and improvement location permits and to issue the stop-work order. At the final pretrial conference, the Plaintiffs indicated that this claim is brought under both state law and federal law, namely Section 1983 premised upon an alleged violation of the Fourteenth Amendment.

The City Defendants contend that the evidence fails to support Plaintiffs' claim because the City had authority to revoke the permits and issue the stop-work order. These Defendants also argue that the evidence does not establish Plaintiffs had any protectable property interest in the permits. In addition, the City Defendants contend the City cannot be held liable under *Monell* and that the individual defendants are entitled to qualified immunity.

To prevail on their Section 1983 claim against the City, a municipal corporation, the Plaintiffs must prove that the alleged constitutional violations were caused by a custom, policy, or practice of the City. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, 694 (1978); *Looper Maintenance Serv. Inc. v. City of Indianapolis*, 197 F.3d 908, 912 (7th Cir. 1999). Actions of a person with "final policy making authority" are treated as a municipal custom or policy. *See id.* Whether a person is a final policy maker is decided by state or local law. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986); *Kujawski v. Board of County Comm'rs*, 183 F.3d 734, 737 (7th Cir. 1999).

The Plaintiffs claim that Lausch, the Director of the DMD, was the final policy maker "in this matter." (Closing Argument of Pls. at 16.).

The City Defendants claim that the evidence does not establish that Lausch was a final policy maker. It is hard to imagine how Lausch could be anything other than a final policy maker. At all relevant times, he was the Director of and highest ranking official in the DMD. Furthermore, the City's Revised Code provides that the Director of the DMD "shall ... establish policies and goals for the department subject to limitations prescribed by law, direction provided by the mayor, and policies and goals properly established by the metropolitan development commission ...." (Rev. Code § 231-212(9) (1998)). Thus, under the Revised Code, Lausch as the Director of the DMD is a final policy maker. Lausch was actively involved in drafting the revocation letter and integrally involved in the matters leading up to the issuance of the stop-work order. Lausch's actions are properly treated as policy of the DMD and the City. Therefore, *Monell* is no bar to the Plaintiff's claims against the City. Whether the Plaintiffs will prevail in the end is another matter.

Under the City's Revised Code, the DMD's Division of Permits has the authority to enforce land use requirements and promote responsible development through inspections and the issuance of permits. (Rev. Code § 231-306(a) (1998)). The Revised Code vests the Division of Permits with the following authority:

> (2) Powers and duties which the division of buildings is authorized or required to carry out under this Code, including but not limited to powers and duties found in Chapter[] ... 536 ... of the Code;

(3) ... issue building permits, make building inspections ...;

(4) Enforce provisions of state law or city ordinance relating to the development, condition, maintenance or use of real estate, as required by ordinance or assigned by the mayor; and

(5) Any other powers and duties granted by statute or ordinance or delegated by the mayor.

(Rev. Code § 231-306(b)(2), (3), (4), (5) (1998)). Thus, Section 231-306(b)(2), grants the Division of Permits the powers and duties set forth in Chapter 536 of the Revised Code, which includes the powers and duties to revoke building permits and to issue stop-work orders. (Rev. Code § 536-704(1), 536-705 (1998)). The Division of Permits, therefore, has the authority to revoke permits and issue stop-work orders.

The evidence presented establishes that the Division of Permits revoked the permits issued to the Boczars and issued the stop-work order. James H. Andrews, Jr., the Assistant Administrator for Permits Code Compliance in the Division of Permits authorized and approved of the revocation of the permits. The authority to revoke permits had been delegated to Andrews by the Administrator of the Division of Permits, Tim George. Also, George was aware of the revocation of the Boczars' permits and there is no evidence that he opposed the revocation of the Boczars' permits. In addition, Eugene Lausch, the Director of the DMD authorized and approved of the revocation. As for the stop-work order, it was authorized by Assistant Administrator Andrews and issued by a DMD inspector. Thus, the DMD through its Division of Permits revoked the Boczars' permits and issued the stop-work order.

The revocation of the permits and issuance of the stop-work order were in compliance with the Revised Code. Under Chapter 536 a building permit may be revoked under certain specified conditions, including that: "The application, plans or supporting documents contain a false statement or misrepresentation as to a material fact ...." (Rev. Code § 536-704(1) (1998)). This condition is easily satisfied in the instant case.[18] It is undisputed that the set of plans included with the Boczars' permits application was different than the set of plans submitted to and approved by the MSPC. In fact, the former plans were very different from the latter plans. Thus, in submitting their application for the building and improvement location permits, the Boczars misrepresented that the plans submitted therewith were the same plans approved by the MSPC and upon which a Certificate of Appropriateness was issued. Indiana state law precludes the DMD from issuing the permits for which the Boczars applied unless the permit application is accompanied by a Certificate of Appropriateness. *See* IND. CODE § 36-7-11.2-61(c). Therefore, the Boczars' misrepresentation constituted a misrepresentation of a material fact--that the Certificate of Appropriateness accompanying the permit application covered the set of plans submitted with that application to the DMD. The Division of Permits' revocation of the permits issued for

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[18] The Plaintiffs argue that the City has not shown a misrepresentation as to a material fact, but as discussed, this argument is unavailing. They claim the City was obligated to review the plans on file with the MSPC before issuing the building permits, but they cite no authority to support this claim. Even if true, the City's failure to review the plans on file with the MSPC does not allow the Plaintiffs to benefit from their failure obtain a Certificate of Appropriateness for the construction and remodeling actually performed on their residence. *See* IND. CODE § 36-7-11.2-61.

the Boczars was authorized by and in compliance with the applicable statutes and ordinances.

Chapter 536 provides for the issuance of stop-work orders under certain specified circumstances, including that construction is proceeding in violation of the building standards and procedures, or proceeding without a building permit when one is required. (Rev. Code § 536-705(2), (4) (1998)). The Revised Code defines "building standards and procedures" as "the regulations, standards or requirements relative to ... construction activity ... established by or under federal law, state law, or city ordinances." (Rev. Code § 536-111(b) (1998)). The construction activity at the Boczars' property violated subsection (2) of § 536-705 and, once the necessary permits were revoked, continued construction violates subsection (4).

As to subsection (2), the construction was in violation of Indiana Code § 36-7-11.2-61(c), which requires the grant of a Certificate of Appropriateness by the MSPC as a prerequisite for the issuance of a permit. The MSPC has not granted a Certificate of Appropriateness for the plans on which the construction activity at the Boczar property are based. In addition, because the Division of Permits revoked the necessary permits in late November 1998, any subsequent construction activity on the Boczar property would violate subsection (4) of § 536-705. Thus, the Division of Permits' issuance of the stop-work order was authorized by and in compliance with the applicable statutes and ordinances.

It is noted that the stop-work order prohibits any and all interior work. Because of this, the court previously expressed some concern over the breadth of the order, which prohibited interior work within the original footprint of the residence. (*See* Entry Denying Pls.' Appl. for Prelim. Inj. at 20-21.). The evidence at trial, however, establishes that the City allowed the Plaintiffs to perform interior work within the original footprint of the residence; yet, the Plaintiffs simply chose not to have such work performed.

The Plaintiffs claim that the City is estopped from revoking their building permits. This claim fails for at least three reasons. First, the Plaintiffs have not affirmatively pled an equitable estoppel claim. *See Warner v. Riddell Nat'l Bank*, 482 N.E.2d 772, 775 (Ind. Ct. App. 1985). Moreover, to prevail on this claim, the Plaintiffs would have to demonstrate that they "lacked knowledge or the means of knowledge of the matter in question." *City of Crown Point v. Lake County*, 510 N.E.2d 684, 687 (Ind. 1987). Contrary to the Plaintiffs' assertion, the "matter in question" is not "how does the City review an application for building permits in a geographic area which has additional restrictions." Rather, the matter in question is whether the Plaintiffs' permit application submitted to the City was supported by the plans approved by the MSPC. There is no doubt the Plaintiffs knew they were not. Finally, "[a] party petitioning for equitable relief must come before the court with clean hands." *Alber v. Standard Htg. & Air Conditioning, Inc.*, 476 N.E.2d 507, 510 (Ind. Ct. App. 1985). The Plaintiffs knew the plans on which they based their reconstruction project were not the plans for which a Certificate of Appropriateness had been obtained, but they submitted them to the DMD

anyway. They cannot now claim the City should be equitably estopped from revoking wrongfully obtained permits. The conclusion that the City had authority to revoke the Boczars' permits and issue the stop-work order obviates the need to consider whether the individual City Defendants are entitled to qualified immunity. *See, e.g., Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 597 (7th Cir. 1997), *cert. denied, 522 U.S. 1116 (1998). Since* the City Defendants had the authority to revoke the permits and issue the stop-work order, they are entitled to judgment on the claims against them in Count III.

C. Count V: Fourteenth Amendment Due Process Claim

The Plaintiffs claim that the actions of all Defendants were arbitrary and capricious and violated their due process rights protected by the Fourteenth Amendment to the U.S. Constitution. As against the MSPC members individually, only the claim for equitable relief remains under this count; the damages claim was dismissed before trial. Count V in its entirety remains as against the City Defendants. Both the City Defendants and the State Defendants contend that the Plaintiffs had no protectable property interest in their permits.[19]

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[19] The Defendants advance other arguments but the court need not discuss them here. As discussed, the City Defendants' *Monell* argument is not persuasive. The same is true for their capacity argument regarding Halvorson and Kingen. Because the court finds the Plaintiffs have not proven a deprivation of a protectable property interest, it need not decide whether the individual defendants are entitled to qualified immunity or whether the state appeal process afforded the Plaintiffs all the process they were due.

The protections of procedural due process extend only to deprivations of life, liberty and property interests protected by the Fourteenth Amendment. *See Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). The plaintiffs must show a "legitimate claim of entitlement" to the claimed protected interest. *See Roth*, 408 U.S. at 577; *see also Thornton v. Barnes*, 890 F.2d 1380, 1386 (7th Cir. 1989) (property interest in employment context); *Shook Heavy & Envtl. Constr. Group, a Div. of Shook, Inc. v. City of Kokomo*, 632 N.E.2d 355, 361 (Ind. 1994) (stating that "to have a property interest in a benefit, a person must have a legitimate claim of entitlement to it, derived from statute, legal rule or mutually explicit understanding."). State law determines whether a plaintiff has a legitimate claim of entitlement to a property interest. *See Roth*, 408 U.S. at 577; *Matter of Wilson*, 610 N.E.2d 851 at 857. The Plaintiffs claim a property interest in the building and improvement location permits at issue.

They rely on three cases in support of their claim to a property interest: *Knutson v. State ex rel.* Seberger, 239 Ind. 666, 160 N.E.2d 200 (Ind. 1959), *Yater v. Hancock County Bd. of Health*, 677 N.E.2d 526 (Ind. Ct. App. 1997), and *Ailes v. Decatur County Area Planning Comm'n*, 448 N.E.2d 1057 (Ind. 1983). Both *Knutson* and *Yater* recognize the general rule that applicants for a permit have a right to have their applications considered in accordance with the laws and ordinances in effect at the time the application was made. *See Knutson*, 160 N.E.2d at 201; *Yater*, 677 N.E.2d at 529. *Ailes*, which held that a certain zoning ordinance prohibiting the continuation of an existing lawful use within a zoned area violated federal due process, was overruled in *Board of Zoning Appeals v. Leisz*, 702 N.E.2d 1026, 1032 (Ind. 1998). None of these

cases support Plaintiffs' claim to a property interest in their building and improvement location permits. Plaintiffs are not alleging that their application for these permits was not decided in accordance with the laws and ordinances in effect at the time of their application.

The permits at issue were based upon Dr. Boczar's permit application and plans submitted therewith which misrepresented that the plans had been approved by the MSPC. Thus, the DMD issued the permits upon a mistake of fact and in violation of the ordinance requiring the MSPC's approval. Consequently, the permits did not create a protectable property interest. *See Bone v. City of Lafayette, Ind.*, 919 F.2d 64, 65 (7th Cir. 1990) (holding that "the permit itself was not 'property' because under state law a permit issued in violation of law is void."); *accord Rivera v. City of Phoenix*, 186 Ariz. 600, 925 P.2d 741, 743-44 (Az. App. 1996) (holding property owner had no vested property right in building permit which was based on misrepresentation in permit application and in violation of zoning code); *Matheson v. De Kalb County*, 257 Ga. 48, 354 S.E.2d 121, 122 (Ga. 1987) (holding that building permit issued in violation of ordinance or under mistake of fact is void and its owner does not acquire any vested rights); *Miller v. Board of Adjustment*, 521 A.2d 642, 647-48 (Del. Super. 1986) (holding that permit issued illegally, in violation of law or under mistake of fact does not confer vested right in owner, even though substantial expenditures are made in reliance on the permit).

Plaintiffs also claim a property interest in "the use of the 4821 for a temporary period." (Resp. of Pls. Linda Morrison Boczar and James J. Boczar in Opp'n to City Defs.' Mot. for J. as Matter of Law at 5.). The court presumes that Plaintiffs intend to

claim a property interest in the use of their property at 4821 N. Meridian Street while it is under construction. The evidence establishes, however, that the Plaintiffs were not deprived of all use of their property. Rather, they have had continuous use of the property since the issuance of the revocation letter and stop-work order. The residence at 4821 N. Meridian Street has remained habitable and the Plaintiffs have continued to live there. The property has not been condemned; the Plaintiffs have not been evicted. In addition, the evidence establishes that the City has allowed the Plaintiffs to make their residence weather tight. To the extent the Plaintiffs have chosen not to do so, that is of their own doing. They contend that the change in the pitch of the roof requires that the two chimneys be extended but the City has not permitted such an extension. The use of chimneys, however, does not rise to the level of a protectable property interest.

The court concludes that the Plaintiffs have failed to identify a property interest to which the Fourteenth Amendment's due process protections extend. They therefore have not prevailed on their Section 1983 claims based on an alleged procedural due process violation.

This failure also dooms their Section 1983 claims based on an alleged deprivation of substantive due process. "A claim based on substantive due process must be based on the deprivation of an underlying protected life, liberty or property interest." *Zorzi v. County of Putnam*, 30 F.3d 885, 894 (7th Cir. 1994); *Jeffries v. Turkey Run Consol. School Dist.*, 492 F.2d 1, 3-4 (7th Cir. 1974).[20] The failure to prove a

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[20] Neither of the cases upon which the Plaintiffs rely in support of their substantive due process claim holds otherwise. *See Kujawski v. Board of County Comm'rs*, 183 F.3d 734 (7th Cir. 1999); *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988).

deprivation of a protectable interest is fatal to a substantive due process claim. *See Jeffries*, 492 F.2d at 3-4. Therefore, the Defendants are entitled to judgment on the Plaintiffs' Section 1983 claims premised upon an alleged deprivation of substantive due process.

Accordingly, the MSPC members individually are entitled to judgment in their favor on the equitable claims in Count V and the City Defendants are entitled to judgment on Count V.

D. Count VI: Due Course of Law Claim

In Count VI, the Plaintiffs allege that the actions of the Defendants were arbitrary and capricious and violated the Plaintiffs' due process rights under Article 1, Section 12 of Indiana's Constitution. The claims for both equitable relief and damages remained at the time of trial. The City Defendants maintain there is no action for damages directly under the Indiana Constitution and that the evidence fails to establish a violation of that Constitution. The State Defendants assert the defense of quasi-judicial immunity as against the state law claims, thus including the claim asserted in Count VI. In addition, they contend the Plaintiffs cannot prevail on this claim because they have not proven that they had a protectable property interest and because the state provided them sufficient process.

1. Damages Claims Directly Under Indiana Constitution

The court holds that the Plaintiffs cannot prevail against any Defendant on a claim for damages directly under Article 1, Section 12 of the Indiana Constitution. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court recognized an implied right of action for damages under the United States Constitution against federal agents for violations of federal constitutional rights.[21] The Indiana Supreme Court has not directly addressed whether there is an analogous cause of action under the Indiana Constitution. One federal district court has held that a plaintiff may bring a damages action under the equal protection clause of the Indiana Constitution. *See Discovery House v. Consolidated City of Indianapolis*, 43 F. Supp. 2d 997, 1004 (N.D. Ind. 1999). Judge Hamilton of this court, however, declined to recognize an implied right to sue for damages under the Indiana Constitution. *See Craig v. Christ*, 1999 U.S. Dist. LEXIS 17548, No. IP 96-1570-C H/G, Entry on Defs.' Mots. for Summ. J. and to Dismiss and City's Mot. to Strike at 5 (Dec. 15, 1998). The undersigned finds Judge Hamilton's decision more persuasive than that in *Discovery House*.

In reaching the decision in *Discovery House*, the court relied on the Indiana Supreme Court's implicit acceptance of such an action in *Bayh v. Sonnenburg*, 573 N.E.2d 398 (Ind. 1991), and the decisions of lower Indiana courts in *Hilburt v. Town of*

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[21] Though *42 U.S.C. § 1983* provides for a cause of action for violations of the United States Constitution, it does not provide for a cause of action for violations of a state constitution

Markleville, 649 N.E.2d 1036 (Ind. Ct. App. 1995), and *Orr v. Sonnenburg*, 542 N.E.2d 201 (Ind. Ct. App. 1989). *See Discovery House*, 43 F. Supp. 2d at 1004. The Indiana Supreme Court did not expressly recognize a cause of action for damages under the Indiana Constitution in *Bayh*. *See* 573 N.E.2d at 411-12 (holding that plaintiffs' constitutional claim failed on the merits). The court did not decide the issue in *Hilburt*, but rather, merely assumed such an action could be maintained. *See Hilburt*, 649 N.E.2d at 1041 ("Even assuming, but expressly not deciding, that an action for damages such as Hilburt's may be brought under Section 12, Hilburt's constitutional arguments fail on the merits.") Though the court upheld a damages award under the Indiana Constitution in *Orr*, the court simply concluded without discussion, that such an action could be maintained. *See Orr*, 542 N.E.2d at 205 ("One of the theories of recovery upon which the Plaintiffs relied, and upon which the trial court's judgment may be sustained, is Article I, § 21 of the Indiana Constitution.") Thus, as the *Discovery House* court acknowledged, none of these decisions expressly recognized a cause of action for damages under the Indiana Constitution.

It is unlikely that the Indiana courts would recognize an implied right of action for damages under the Indiana Constitution for at least two reasons. First, Indiana's courts have been hesitant to recognize implied rights of action under Indiana statutory law. *See, e.g., Right Reason Publications v. Silva*, 691 N.E.2d 1347, 1352 (Ind. Ct. App. 1998) (no private cause of action for violation of Indiana Code § 35-46-2-1); *Holvoet v. State*, 689 N.E.2d 469, 472 (Ind. Ct. App. 1997) (no private right to petition court to convene grand jury under Indiana Code § 35-34-2-2), *trans. denied, 706 N.E.2d 167 (Ind. 1998);*

Vukovits v. Board of Sch. Trustees, 659 N.E.2d 174, 179 (Ind. Ct. App. 1995) (no private cause of action for non-renewal of teacher contracts under staff performance evaluation statute), *trans. denied; Walling v. Appel Serv. Co.*, 641 N.E.2d 647, 652 (Ind. App. 1994) (no private cause of action for a violation of Indiana Code § 13-7-4-1); *Coons by Coons v.* Kaiser, 567 N.E.2d 851, 852 (Ind. Ct. App. 1991) (declining to imply additional private cause of action based on Indiana Code § 20-7.5-1-14 where statute already provided for enforcement); *but see Stampco Const. Co. v. Guffey*, 572 N.E.2d 510 (Ind. Ct. App. 1991) (recognizing an implied private cause of action for violations of minimum wage statute). There is no reason to believe they would treat constitutional law any differently. In addition, when determining whether there exists a private cause of action for a violation of statutory law, Indiana courts begin by examining legislative intent. *See City of Muncie v. Peters*, 709 N.E.2d 50, 56 (Ind. Ct. App. 1999), *trans. denied.; Coons*, 567 N.E.2d at 852; *Silva*, 691 N.E.2d at 1352; *Bartholomew County Beverage Co. v. Barco Beverage Corp., Inc.*, 524 N.E.2d 353, 356 (Ind. Ct. App. 1988) (same). By analogy, the Indiana courts would begin with the intent of the framers of the Indiana Constitution to determine whether there is a private cause of action for damages for constitutional violations. It is unlikely that the framers intended such an action because they would have understood sovereign immunity to bar such an action. *See, e.g., Shoemaker v. Board of Comm'rs*, 36 Ind. 175, 186 (1871).

This court declines to recognize a cause of action for damages directly under the Indiana Constitution absent clear indication from the Indiana Supreme Court (or even

Indiana's appellate courts) that such an action may be maintained. Accordingly, Plaintiffs' damages claims under Count VI will be DISMISSED.

2. Damages Claims Against MSPC Members Individually

Plaintiffs cannot prevail on their damages claims under the Indiana Constitution against the MSPC members individually for another reason: the members are entitled to quasi-judicial immunity. Under Indiana law, officials who perform quasi-judicial functions are entitled to absolute judicial immunity. *See, e.g., H.B. v. State of Indiana-Elkhart Div. of Family & Children*, 713 N.E.2d 300, 302 (Ind. Ct. App. 1999). In deciding whether an official is entitled to judicial immunity, Indiana courts employ the same functional approach used by federal courts in determining whether an official is entitled to judicial immunity. *See, e.g., H.B.*, 713 N.E.2d at 302. This functional approach was used by this court in ruling on the State Defendants' motion to dismiss wherein the court determined that the MSPC members were entitled to absolute quasi-judicial immunity from Plaintiffs' federal damages claims. (*See* Entry on Mot. to Dismiss at 17-20.).

The court did not determine that the members were entitled to immunity from the state law damages claims only because the court did not understand their motion to be asserting the immunity defense as against Plaintiffs' state law claims. It is now clear that the State Defendants have raised this defense as against the state law claims. (*See* Tr. Br. Anticipating Mot. for Involuntary Dismissal at 3-6; Mot. for Involuntary Dismissal P 2; Mem. in Support of Mot. for Involuntary Dismissal at 7-10;

Commissioners' Mem. in Lieu of Closing Argument at 7-9). The MSPC members are entitled to absolute quasi-judicial immunity against Plaintiffs' state law damages claims for the same reasons the members are entitled to immunity as against the federal claims. Accordingly, the claims for damages under the Indiana Constitution against the MSPC members individually should be DISMISSED on this basis as well.

3. Equitable Claims Under Due Course of Law Provision

In deciding claims under the Due Course of Law provision of the Indiana Constitution, Indiana courts use the same analysis as applied to the federal procedural due process claims. *See Indiana High School Athletic Ass'n, Inc. v. Carlberg*, 694 N.E.2d 222, 241 (Ind. 1998); *Shook Heavy & Envtl. Constr. Group*, 632 N.E.2d at 361. Thus, the court's conclusion that Plaintiffs have identified no protectable property interest dooms Plaintiffs' claims under the Due Course of Law provision. They therefore are not entitled to equitable relief under this claim. All Defendants accordingly are entitled to judgment on the equitable claims in Count VI.

E. Count VII: Takings Claim

Count VII alleges that the acts of Lausch, Fields and the City constitute an unlawful taking of the Plaintiffs' property without just compensation. It is unclear whether this claim is brought under the Fifth Amendment applicable to the states under the Fourteenth Amendment or under Article I, Section 21 of the Indiana Constitution, or both. The City Defendants argue that this claim is barred for failure to pursue an

inverse condemnation action under state law.[22] These Defendants also argue that the Plaintiffs are not entitled to any compensation for the "taking" of their permits because they had no property right in the same.

The Plaintiffs' federal takings claim is not ripe until they have sought just compensation through an inverse condemnation action in Indiana state courts. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 196-97 (1985) ("If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and has been denied just compensation."); *Forseth v. Village of Sussex*, 199 F.3d 363, 373 (7th Cir. 2000); *Himelstein v. City of Fort Wayne, Ind.*, 898 F.2d 573, 576 (7th Cir. 1990); *Discovery House, Inc. v. Consolidated City of Indianapolis*, 43 F. Supp. 2d 997, 1004-05 (N.D. Ind. 1999). The same is true for the Plaintiffs' takings claim if brought under the Indiana Constitution. *See Board of Zoning Appeals v. Koehler*, 244 Ind. 504, 194 N.E.2d 49 (Ind. 1963); *Impink v. City of Indianapolis, Bd. of Public Works*, 612 N.E.2d 1125, 1127 (Ind. Ct. App. 1993) (dismissing takings claim under United States and Indiana Constitution because of failure to pursue inverse condemnation remedy).

The Plaintiffs argue that their takings claims are ripe because they initially filed this action in state court. The filing of this action in state court alone does not make the Plaintiffs' takings claims ripe for review. The original complaint filed in state court did

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[22] The State Defendants make this same argument, but no takings claim is pled against them

not assert an inverse condemnation claim. The court does not ask in what forum--state or federal--did the Plaintiffs file their action, but whether they have sought just compensation through state procedures before bringing their takings claims. The Plaintiffs have not sought just compensation through an inverse condemnation action.[23] Thus, their federal and state takings claims are not ripe and should be **DISMISSED**.[24]

III. Conclusion

"Federal courts are not boards of zoning board appeals." *Doherty v. City of Chicago*, 75 F.3d 318, 325 (7th Cir. 1996) (quoting *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994)). Enough (finally) said.

The MSPC members individually will be **GRANTED** judgment in their favor on the equitable claims asserted against them in Count I. The City Defendants will be **GRANTED** judgment in their favor on all claims asserted against them in Count III. The MSPC members individually and the City Defendants will be **GRANTED** judgment in their favor on Count V. The MSPC members individually and the City Defendants will be **GRANTED** judgment in their favor on the equitable claims asserted against them in

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[23] Inverse condemnation is an action "against an entity with the power to condemn (usually a governmental defendant) to recover the value of property which has been taken in fact, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *City of Gary v. Belovich, 623 N.E.2d 1084, 1085 n.1 (Ind. Ct. App. 1993)* (internal citation omitted).

[24] Moreover, if ripe, the Plaintiffs' takings claims would fail. As discussed, they have not shown any protectable property right taken by the City Defendants.

Count VI. Plaintiffs' damages claims under Count VI will be **DISMISSED**, and Count VII will be **DISMISSED** as unripe.[25]

A final judgment will be entered in accordance with this entry and with the Entry on Motion to Dismiss.

ALL OF WHICH IS ORDERED this 9th day of March 2000.

John Daniel Tinder, Judge
United States District Court

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[25] Both the Complaint and Amended Complaint name John/Jane Doe as Defendants. Counsel for the State Defendants entered an appearance on behalf of Roll McLaughlin and Kipp Normand, who the court understands to be members of the MSPC and the John/Jane Does named as Defendants. Thus, this Entry, the Entry on Motion to Dismiss, and the final judgment applies to the claims against McLaughlin and Normand.